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Supreme Court of the United States.

OCTOBER TERM, 1962.

WILLIAM H. LEGATE,
Petitioner,

v.

J. JOSEPH MALONEY, JR., RECEIVER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, William H. Legate, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on September 28, 1962.

Opinions Below.

The memorandum opinion of the District Court is reported in 204 F. Supp. 944, and is printed as Appendix A, *infra*. The opinion of the Court of Appeals is reported in 308 F. 2d 228, and is printed as Appendix B, *infra*.

Jurisdiction.

The appeal was dismissed on September 28, 1962 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The questions presented on the petition to this Court are:

(1) Was the order of the District Court dismissing the petition on the ground of lack of jurisdiction over the Exchange a final and appealable order?

(2) Did the absence of a formal order, separate from the order contained in the memorandum of decision, warrant refusal by the court below to hear the appeal?

Statement of the Case.

The petitioner's appeal to the court below was from an order of the District Court contained in a "Memorandum of Decision" dated May 1, 1962, which allowed a motion to dismiss the petitioner's petition for relief against the New York Stock Exchange (hereinafter called "Exchange") on the ground of lack of jurisdiction over the Exchange (App. A, *infra*.). When the petitioner appealed therefrom to the court below the appellee (the receiver) filed a motion to dismiss the appeal on the ground that the District Court's order "does not constitute a final or appealable order" (R.A. 1).[1] Upon that motion, without hearing oral argument thereon, the court below, in a per curiam opinion by two members of that court, dismissed the appeal "for lack of appellate jurisdiction" (App. B, *infra*).

Thus both the District Court and the court below refused to pass upon the sufficiency of the petition—the District Court on the ground that it lacked jurisdiction over the Exchange, and the court below "for lack of appellate jurisdiction."

---

[1] References to R.A. are to the Record Appendix filed in the court below, copies of which are filed herewith. References to "App." refer to the appendices to this petition.

The following facts are shown by the averments of the petitioner's petition: On September 17, 1960, the District Court appointed a receiver of duPont Homsey & Co. (hereinafter called "firm"), a member of the Exchange. Shortly thereafter the Exchange proposed to the receiver a plan which was incorporated in a document filed in that court on November 3, 1960, entitled: "Receiver's Plan for Partial Liquidation" (hereinafter called "Plan") (R.A. 11-35). After notice and hearing, the court entered an order on November 15, 1960, approving the Plan and authorizing the receiver "to carry out the provisions" thereof upon the proviso that "the obligations of the New York Stock Exchange are fulfilled according to its terms" (R.A. 37, 38). By another order, called "Bar Order," creditor claims against the firm were to be filed by December 14, 1960 (R.A. 36, 37). The petitioner seasonably filed his proof of claim (R.A. 38).

Pursuant to the Plan, the Exchange bound itself, *inter alia*

(1) To purchase the claims of certain creditors (designated in the Plan as "special claimants"), which claims were to be subordinated to the claims of "all customers and creditors of the firm" (R.A. 33, 34), the avowed reason for such purchase and subordination being "doubt as to the firm's solvency and the consequent possibility that the appointment of a Receiver constituted an act of bankruptcy" (R.A. 12, par. 4).

(2) To supply to the receiver, to the extent that the firm's assets should be insufficient therefor, funds for the payment of claims of customers and creditors of the firm (R.A. 13, par. 6) as well as for the "costs and expenses of administration of the receivership, including allowances to Court appointed attorneys and auditors" (R.A. 19, par. 19).

On July 5, 1961, a petition was filed in the receivership proceedings by counsel for the Exchange to have the sub-

ordinated claims (which had been paid for and purchased by the Exchange from the so-called "special claimants") allowed as general-creditor claims (R.A. 54). Thereafter, on October 27, 1961, the petitioner filed his petition praying (R.A. 64) (1) that his rights against the Exchange "be declared and adjudged"; (2) that it be adjudged that in respect of the subordinated claims purchased by the Exchange the petitioner "is entitled to priority over the Exchange"; (3) that the Exchange be ordered to pay him "the amount of his proof of claim, with interest, less the amount to be received by the petitioner thereon from the receivership assets"; and (4) "for such other and further relief as justice and equity may require" (R.A. 64).

The petition, as amended before the filing of any responsive pleading thereto, further averred that all claims of creditors of the firm have been "disposed of or provided for" except only (*a*) the claim of the petitioner and (*b*) that of the Exchange as the purchaser of the subordinated claims; that "all costs and expenses of or relating to said receivership and the administration thereof, including counsel fees, have been either paid or fully provided for"; that the receiver holds an excess of assets and that with respect thereto "the real and only parties in interest are the petitioner, on the one hand, and the Exchange on the other; that the receiver therefore is, in essence and in equity, merely a stakeholder of said excess of assets for the benefit of the petitioner or of the Exchange as may be finally determined herein; and that this petitioner is entitled to the benefit of any and all defenses and counterclaims that the receiver has against said claim of the Exchange" (R.A. 67).

The petition further averred that in 1934 the Exchange was registered as a National Securities Exchange under section 6 of the Securities Exchange Act of 1934 (hereinafter called "Act"); that, with respect to the firm, the Exchange had failed and neglected to perform the duties

and obligations imposed upon it by the Act and by the regulations promulgated thereunder by failing and neglecting to make diligent inquiry and investigation into the financial condition, dealings, acts and conduct of the firm and of its managing and controlling general partner; that the Exchange, having knowledge that the firm had, on a number of occasions in 1959 and in several prior years, violated the Act and the regulations thereunder, had failed to take seasonable and adequate disciplinary action against the firm; and that the Exchange is therefore liable to the petitioner for the amount of his loss (R.A. 58-64).

In the receivership proceedings the Exchange had appeared by counsel in the District Court many times in connection with the Plan and with the approval and consummation thereof and also (as the docket in the receivership shows) in connection with orders entered against it, directing payment to the receiver (R.A. 5), and on proceedings in that court by other creditors of the firm.

The motion to dismiss the petition was filed in the name of the receiver although the petition asked relief, not against the receiver, but against the Exchange; and in the court below the motion to dismiss the appeal was in the name of the receiver, though the allowance thereof enured to the benefit of the Exchange. The counsel for the Exchange was permitted by the District Court to act as counsel for the receiver over the petitioner's objection and motion to disqualify him (R.A. 7).

Reasons for Granting the Writ.

The reasons for granting the writ are:

1. That the dismissal of the appeal is in conflict with the decision of the Court of Appeals in *Marshall* v. *Saucier*, 301 F. 2d 639 (9 Cir., 1962).

2. That the dismissal of the appeal is contrary to the letter and spirit of the Federal Rules of Civil Procedure.

3. That the dismissal of the appeal is not in conformity with the basic principles and mandates announced by the decisions of this Court and by those of the United States Courts of Appeals of other circuits.

4. That the propriety of the dismissal of the appeal, which deprives the petitioner of a speedy hearing on his petition, is a subject of vital importance to litigants in the federal courts.

Summary of Argument.

Though the order of the District Court dismissing the petition against the Exchange for lack of jurisdiction was contained in a memorandum of decision, the finality of the dismissal on that ground is amply shown thereby; and it is amply settled that in such instances an appeal lies without a formal, separate order or judgment.

Argument.

The District Court has clearly indicated that it will not entertain the petition against the Exchange. The dismissal of the appeal by the court below is contrary to the mandate that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action" (Rule 1) and all pleadings shall be "so construed as to do substantial justice" (Rule 8(f)).

The dismissal of the appeal is also contrary to the spirit of those Rules as set forth by this Court in the very recent decision in *Foman* v. *Davis* (December 3, 1962), where the court below dismissed the plaintiff's appeal from the District Court's order dismissing her complaint, on defen-

dant's motion to dismiss. In that case this Court quotes with approval from *Conley* v. *Gibson*, 355 U.S. 41, 48, the principle "that the purpose of pleading is to facilitate a proper decision on the merits" and says:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."

By the dismissal of his appeal for "lack of appellate jurisdiction" the petitioner herein has been denied a review of the District Court's holding that it lacked jurisdiction over the Exchange.

The petitioner earnestly urges that the numerous actions and appearances of the Exchange in the receivership proceedings in the District Court, as shown by that court's docket entries (R.A. 3), subjected the Exchange to the jurisdiction of that court in those proceedings, under the principles recognized and approved by the highest authority.

In *Wabash Western Railway* v. *Brow*, 164 U.S. 271; 17 S. Ct. 126, this Court says at page 278:

> "An appearance which waives the objection of jurisdiction over the person . . . may be effected in many ways, and *sometimes may result from the act of the defendant even when not in fact intended.*" (Emphasis supplied.)

In *Merchants Heat & Light Co.* v. *James B. Clow & Sons*, 204 U.S. 286; 27 S. Ct. 285, this Court, speaking by Mr. Justice Holmes, says at page 290:

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the

jurisdiction, but we are aware of none as to the proposition that when he does became an actor in a proper sense he submits."

In *Alexander* v. *Hillman*, 296 U.S. 222; 56 S. Ct. 204, the equity receivership of Tower Hill Coke Co. was pending in the United States District Court for West Virginia. Three persons, all residents of Pennsylvania, presented claims against the Coke Company in those receivership proceedings. The receiver filed, in those proceedings, a petition against the claimants to recover damages suffered by the Coke Company as a result of their alleged misfeasance. They moved to dismiss on the grounds: that, they being residents of Pennsylvania, the court lacked jurisdiction over them; that no process had been issued on the petition or served upon them; and that the claims against them could be adjudged only on an original complaint—not on a petition in the receivership. Their motion to dismiss was allowed by the receivership court and, on appeal, the United States Court of Appeals affirmed. But this Court granted certiorari and then reversed the two lower courts in a unanimous decision, saying at page 238:

"Unquestionably, they [claimants] submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers *and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims. . . .*"

At page 239:

"The ancillary bill is not an original bill for the commencement of a suit. *That it was not so intended is shown by the fact that process was not prayed or issued.* While in form not inappropriate for commencement of suit, it was in fact formulated and filed to serve

as a pleading in the main suit to put respondents to proof of their claims and to assert the right to affirmative relief. Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them. See Story, Equity Jurisprudence, 14th ed., § 28."

At page 241:

"By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 [Judicial Code, 28 U.S.C. § 112], to the contrary nothwithstanding. . . ."

At page 243:

"*Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere.*

"It is clear that, under the circumstances disclosed, the restrictions laid by the Circuit Court of Appeals upon the receivership court are not consistent with that freedom as to procedure that necessarily belongs to courts of equity administering receiverships. [Cases cited.] Its decree will be reversed and the case remanded to the district court with directions to proceed in accordance with this opinion." (Emphasis supplied.)

The import of this decision applies to the petitioner's right to maintain his petition against the Exchange, for his petition, as amended, avers that all costs and expenses of the receivership and all claims of creditors against the

firm had either been paid or fully provided for, except only (*a*), on the one hand, those of the petitioner, and (*b*), on the other hand, the subordinated claims which the Exchange had purchased and which its counsel and "nominee" had petitioned, on July 5, 1961, to have established as general creditor claims. The petitioner's petition accordingly alleged that, with respect to any excess assets held by the receiver, he is a mere stakeholder for either the petitioner or the Exchange.

Though thus alleged to be merely a stakeholder, the receiver was nevertheless permitted by the District Court (over the petitioner's objections and motion to disqualify) (R. A. 7) to be represented by the counsel for the Exchange, on the petitioner's petition against the Exchange for damages resulting from its alleged failure and neglect to perform the duties imposed upon it by the Act and the regulations thereunder. It has been decided that the Exchange is liable to a member of the public (including, the petitioner claims, creditors of the defunct firm) for damages resulting from such negligence and derelictions. *Baird* v. *Franklin*, 141 F. 2d 238 (C.C.A. 2d, 1944).

It has been clearly held by this Court and by the United States Courts of Appeals that an order of the District Court, even if made in a memorandum of decision, may be appealable.

United States v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227; 78 S. Ct. 674 (1958).

Brandt v. *Renfield Importers Ltd.*, 278 F. 2d 904 (8 Cir., 1960).

United States v. *Frank B. Killian Co.*, 269 F. 2d 491 (6 Cir., 1959).

Aldrich v. *States Marine Corp. of Delaware*, 265 F. 2d 554 (9 Cir., 1959).

In re Forstner Chain Corp., 177 F. 2d 572 (1 Cir., 1949).

In the *Schaefer Brewing Co.* case, *supra,* this Court said at page 232:

> "'No form of words . . . is necessary to evince [the] rendition [of a judgment].' [Cases cited.] While an opinion may embody a *final decision,* the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion."

In the case at bar the District Court in its memorandum of decision indicated beyond all doubt the finality of its opinion that the Exchange was not subject to its jurisdiction as the basis for its dismissal of the petition.

The dismissal of the petitioner's appeal from that order of the District Court is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the recent case of *Marshall* v. *Sawyer,* 301 F. 2d 639 (9 Cir., 1962). In that case the complaint was dismissed "on the ground that the federal court should abstain and remit plaintiff to his state court remedies" (at page 641). The plaintiff appealed. In holding that the dismissal order of the District Court was appealable, that Court of Appeals said at page 643:

> "The order dismissing the complaint herein is not based upon the ground that appellant has failed to state a claim, but on the ground that, whether or not a claim has been stated the Federal Court should abstain. In view of this ruling, there was no way in which the plaintiff could, by amending his complaint, avoid dismissal of the action. Faced with this barrier to further District Court proceedings, plaintiff's appeal evidences a determination to stand on his complaint and accept the order as a dismissal of the action. We conclude that the order is appealable."

Likewise in the case at bar, the petitioner was faced with a "barrier to further District Court proceedings," in view of that court's determination as to lack of jurisdiction over the Exchange. It is thus plain that the dismissal of the appeal by the court below in the case at bar conflicts directly with the decision of the Ninth Circuit in *Marshall* v. *Sawyer*.

Conclusion.

In view of the foregoing reasons, arguments and authorities, it is respectfully submitted, in conclusion, that a writ of certiorari should issue to the United States Court of Appeals for the First Circuit to the end that the petitioner's appeal from the District Court's order dismissing his petition for lack of jurisdition against the Exchange may be heard on its merits.

Respectfully submitted,

MARK M. HORBLIT,
Attorney for Petitioner.

Dated at Boston, Massachusetts,
December 24, 1962.

Appendix A.

MEMORANDUM OF DECISION ON PETITION OF CLAIMANT LEGATE AND COUNTERCLAIM OF RECEIVER THERETO.

May 1, 1962.

FORD, D.J.

Petitioner Legate in 1959 became a limited partner in the defendant firm now in receivership, turning over to the firm $80,000 in cash and securities. In his proof of claim and petition Legate alleges that he was induced to become a limited partner by the misrepresentations of Homsey, the principal general partner of the firm. He further alleges that the New York Stock Exchange, both before and after the time he became a limited partner, had knowledge that Homsey and the firm in the conduct of their business had violated the law and the rules and regulations of the Exchange and failed to fulfill the duty allegedly incumbent upon it to investigate the conduct of the business and take appropriate disciplinary action against Homsey and the firm, which would have disclosed to Legate the falsity of the representations made to him by Homsey. On the contrary, he alleges, the Exchange engaged in an advertising campaign to persuade the public that member firms of the Exchange had a high standing and reputation for integrity, honesty and character and that petitioner was influenced by this advertising in becoming a limited partner.

Petitioner seeks to rescind his partnership contract on the ground of fraud, to establish his standing as a general creditor for the amount of his partnership contribution, to establish a claimed right to priority over the Exchange as a creditor in the distribution of the assets of the firm, and to recover directly from the Exchange the amount of his partnership contribution less any amount which he may recover from the assets of the firm. The receiver moves to

dismiss the petition insofar as it seeks the establishment of a priority over other creditors or direct recovery against the Exchange.

The first issue between the parties is as to the standing of Legate as a creditor of the firm. If he can prove that, as he alleges, he was induced to become a limited partner by the fraud and misrepresentation of Homsey, then his rights are governed by Mass. G.L. Ch. 108A § 39, which provides:

> "§ 39. Same subject; Rights of Party Entitled to Rescind Partnership Contract.—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—
>
> "(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and
>
> "(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and
>
> "(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership."

Thus Legate, if he can prove his allegations, is entitled to elect to rescind his partnership agreement and to stand as a creditor of the firm for the amount of his partnership contribution. He is not however entitled to priority over the claims of the customers of the firm or their assignees

but only to have his claim satisfied out of any partnership assets remaining after these claims of third parties have been satisfied.

Legate appears to contend that a partnership agreement induced by fraud is void ab initio and that therefore he is entitled to recover the amount of his contribution before claims of third parties against the firm can be satisfied. This contention cannot be accepted in the light of the clear provisions of § 39, whatever support for it may be found in the language of earlier cases such as *Richards* v. *Todd*, 127 Mass. 167. Legate argues that § 39 has no application here since it is found in Ch. 108A, dealing with partnerships in general, and that his rights must be governed by Ch. 109, dealing with limited partnerships. However, Ch. 108A § 7(2) provides that the chapter "shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith." Nothing has been pointed out in Ch. 109 to preclude the application of Ch. 108A § 39 to limited partnerships. Ch. 109 § 13(1) relied on by petitioner provides:

> "§ 13. Same subject; Transactions with Partnership.—(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets."

This means only that when a limited partner deals with the firm, not in his capacity as a limited partner, but in the same manner as a person not a member of the firm, he is to be treated in the same way as any non-member creditor as to those transactions. It has no application to his transactions in his capacity as a partner, and does not preclude

the application of Ch. 108A § 39 to govern his right to recover his partnership contribution.

The second issue is as to petitioner's right to enforce in this receivership proceeding his claim for affirmative recovery against the New York Stock Exchange. No service of process has been made on the Exchange. The Exchange is asserting no claim against the assets of the receivership. Its only connection with the receivership proceedings is that in accordance with a plan approved by the court the Exchange advanced funds to be used for the payment of certain substantial claims against the estate and in return these claimants assigned their claims to a nominee of the Exchange who as assignee has filed a claim as a general creditor for the amount of those claims. Thus the Exchange is not in the position of one who by appearing to assert his own claim against the estate subjects himself to the jurisdiction of the court as to defenses and counterclaims against it. Moreover, Legate's claim is not one which should appropriately be settled in this receivership proceeding. Even assuming that the Exchange should be held to have submitted to the jurisdiction of the court because its nominee asserts claims of which it is the ultimate beneficiary, Legate's petition neither attacks the validity of the nominee's claims in themselves, or sets forth any liability of the Exchange to the firm or its receiver. The claim asserted is an independent one of Legate against the Exchange. Determination of the right of Legate to affirmative recovery is in no way necessary or helpful to the administration of the receivership, but would rather hinder the receivership by involving it in an extraneous controversy.

The receiver has filed a petition in set off and counterclaim against Legate seeking to recover against him for alleged improper withdrawal of part of his capital contribution to the partnership and alleged failure to report

certain improper transactions of the firm which came to his attention. Legate moves to dismiss receiver's petition. The contention of Legate is that the partnership itself would have no right of recovery against him for any of the acts alleged and that therefore the receiver cannot recover since he cannot recover where the firm itself could not. The power of the receiver is not so narrowly restricted as Legate contends. While generally a receiver has no better standing than the defendant whose possession he takes over, there are occasions when he may have greater rights for the protection of creditors. Where, as here, a claim is asserted against a limited partner based on allegedly fraudulent or otherwise wrongful transactions, the receiver is not barred from recovery for the benefit of creditors by the fact that other partners may have participated in or consented to these transactions so as to bar the partnership itself from recovery. *McCandless* v. *Furland*, 296 U.S. 140; *Dabney* v. *Chase National Bank*, 201 F. 2d 635; *Central Hanover Bank & Trust Co.* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130.

The motion of the receiver to dismiss the petition of Legate is allowed with respect to the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange. The motion of Legate to dismiss the receiver's petition for set off and counterclaim is denied.

Appendix B.

OPINION OF COURT OF APPEALS ON MOTION TO DISMISS APPEAL.

Before WOODBURY, *Chief Judge*, and
HARTIGAN, *Circuit Judge*.

Mark M. Horblit and *Samuel H. Kalish* on brief in opposition to motion to dismiss appeal.

Marcien Jenckes, James C. Heigham, Charles H. Morin and *Choate, Hall & Stuart* on motion to dismiss and brief in support thereof.

OPINION OF THE COURT.

September 28, 1962.

PER CURIAM. The court below on a complaint filed by the Securities and Exchange Commission issued a temporary restraining order and appointed a receiver for a co-partnership in the stock brokerage business in Boston, Massachusetts, by the name of du Pont, Homsey & Company. In the course of the proceedings which followed the appellant filed a petition in which he alleged that he had become a limited partner in the firm, turning over to it $80,000 in cash and securities, and that he had filed a proof of claim with the receiver (a) rescinding the partnership agreement and seeking return of his capital contribution to the partnership on the ground of fraud, (b) claiming items provided for him in the partnership agreement and (c) making a separate claim as a customer. The entire proof of claim was referred to a master who has not yet filed his report.

As relief the appellant asks in his petition for rescission of his partnership agreement on the ground of fraud and in addition he seeks to establish his standing as a general creditor for the amount of his partnership contribution, to

establish priority over the New York Stock Exchange as a creditor and to recover the amount of his partnership contribution, less any amount he might recover from the assets of the firm, directly from the Exchange. The receiver answered by filing a petition for setoff and for affirmative relief by way of counterclaim and moved to dismiss the appellant's petition insofar as it sought to establish priority over other creditors or to direct recovery against the New York Stock Exchange. After the hearing the court below filed a memorandum of decision concluding as follows:

> "The motion of the receiver to dismiss the petition of Legate is allowed with respect to the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange. The motion of Legate to dismiss the receiver's petition for setoff and counterclaim is denied."

Legate, alleging the foregoing to be a judgment dismissing his petition, filed notice of appeal. The receiver has moved in this court to dismiss the appeal on the ground that the action of the District Court is not a final or otherwise appealable judgment or order.

We think the receiver's position is well taken. Not only was no formal separate order or judgment entered by the District Court, but also, even if by stretching the point to attenuation, we could regard the final paragraph of the court's memorandum of decision as an informal judgment or order within the ambit of *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958), and *In re Forstner Chain Corp.*, 177 F. 2d 572 (C.A. 1, 1949), it is evident that the action taken by the court did not dispose of *every* issue raised by the petition to say nothing of the issues raised in the receivership proceeding as a whole. The

ourt's action at the most was *purely interlocutory* and no ttempt has been made to invoke the procedures for appeal- ng such action, if indeed such procedures are available. *An order will be entered dismissing the appeal* for lack *f appellate jurisdiction.*

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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 693.

WILLIAM H. LEGATE,
Petitioner,

v.

J. JOSEPH MALONEY, JR., RECEIVER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court (App. A. of Petition) is reported at 204 F. Supp. 944. The opinion of the Court of Appeals for the First Circuit (App. B of Petition) is reported at 308 F. 2d 228.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

(1) Whether the Court of Appeals properly held that the memorandum of decision filed by the District Court did not constitute a final judgment or order for the purpose of appeal from the allowance in certain respects of a motion to dismiss a petition filed in an equity receivership proceeding.

(2) Whether the Court of Appeals properly held that the action taken by the District Court on a petition filed in an equity receivership proceeding in that Court was purely interlocutory and could not be appealed in the absence of any attempt to invoke the procedures for appealing interlocutory decisions.

(3) Whether the Court of Appeals properly held that it had no jurisdiction over petitioner's appeal from the District Court.

Statement.

This petition stems from a proceeding in the United States District Court for the District of Massachusetts entitled *Securities and Exchange Commission* v. *duPont Homsey & Co. et al.* In that proceeding the District Court, on a complaint filed by the Commission, issued a temporary restraining order and appointed a receiver for the Boston stockbrokerage partnership of duPont Homsey & Co. (R.A. 3).[1] The resulting receivership proceedings involve numerous persons who are not parties to this petition (see District Court docket entries, R.A. 3-10) and are not yet

[1] References to R.A. are to the record appendix filed with the petition for certiorari. References to App. are to the appendices filed with that petition.

completed. The respondent in this Court is the present receiver (R.A. 6).

The present petitioner is a limited partner in duPont Homsey & Co. He first entered the District Court proceedings in December, 1960, by filing a proof of claim with the then receiver (R.A. 38-53), (*a*) rescinding the partnership agreement and seeking return of his partnership capital of $80,000 on the basis of fraud, (*b*) claiming unpaid items provided for him in that agreement and (*c*) making a separate customer's claim. The entire proof of claim was referred to a special master (R.A. 9), who has not yet made his report.

Thereafter, on October 27, 1961, the petitioner filed with the District Court a document entitled "Petition of William H. Legate, Claimant" (R.A. 58). Therein he alleged that the New York Stock Exchange (hereinafter called the Exchange), by a nominee, had filed a petition praying for an order establishing it as a general creditor of the receivership estate (R.A. 58); repeated his allegations that he had been fraudulently induced to join duPont Homsey & Co. (R.A. 60-61), and charged that, when he joined the partnership, the Exchange should have made diligent inquiry into the affairs of that firm and revealed to him that it had previously disciplined Anton E. Homsey, the managing partner (R. A. 61-63). The petition also included the following prayers for relief (R.A. 64):

> "1. That the rights of the petitioner as against the New York Stock Exchange be declared and adjudged.
>
> "2. That it be declared and adjudged that in respect of the petitioner's claims against the firm of duPont, Homsey & Co., the petitioner is entitled to priority over the Exchange in any distribution by the Receiver of assets of said receivership.

"3. That the Exchange be ordered to pay to the petitioner the amount of his proof of claim, with interest, less the amount to be received by the petitioner thereon from the receivership assets.

"4. And for such other and further relief as justice and equity may require."

A motion to amend the petition was filed February 27, 1962 (R.A. 66-67), but did not affect the relief sought.

The receiver responded by filing a petition for set-off and for affirmative relief by way of counterclaim and moved to dismiss Mr. Legate's petition insofar as it sought to establish priority over other creditors or direct recovery against the Exchange (R.A. 65-66). After hearing, the District Court filed a memorandum of decision concluding as follows (App. A, p. 17; R.A. 72):

"The motion of the receiver to dismiss the petition of Legate is allowed with respect to the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange. The motion of Legate to dismiss the receiver's petition for set off and counterclaim is denied."

No separate judgment or order to this effect was ever entered nor did the District Judge ever certify his decision to the Court of Appeals under F.R. Civ. P. Rule 54(b), or under 28 U.S.C. 1292(b). In fact, the petitioner never even asked for such certification.

Instead, he alleged the District Court's memorandum to be a judgment dismissing his petition and filed a notice of appeal (R.A. 73). The receiver then moved in the Court of Appeals to dismiss the appeal on the ground that the action of the District Court was not a final or appealable judgment or order (R.A. 1). This motion was granted and

the appeal dismissed "for lack *of appellate jurisdiction*" (App. B, p. 20). The present petition for a writ of certiorari followed.

Argument.

The argument submitted by petitioner in this Court dwells in large part on the merits of his claims in the District Court and upon the possible legal effects of the alleged "numerous actions and appearances of the Exchange in the receivership proceedings" in that Court (Petition, pp. 7-10).[2]

[2] With respect to the asserted "numerous actions and appearances," it may be noted that the Exchange has never appeared in the District Court proceedings. And the docket entries show only the following four entries which could conceivably be traced to the Exchange:

1. Dec. 28, 1960 (R.A. 5), filing by the Exchange of the statement required in the last sentence of section 7 of the Receiver's plan for partial liquidation (see R.A. 14).

2. Dec. 28, 1960 (R.A. 5), and April 11, 1961 (R.A. 5), directing payments by the Exchange to the Receiver under the provisions of the letter of commitment referred to in section 19 of the Receiver's plan (see R.A. 19).

3. May 22 and 27, 1961 (R.A. 6), pertaining to a motion under F.R. Civ. P. Rule 30(b) with reference to the depositions of Exchange employees.

4. July 5, 1961 (R.A. 6), filing of a petition by the nominee of the Exchange as assignee of special claimants provided for in the Receiver's plan (see R.A. 14-16).

None of these involves a claim by the Exchange. The claims filed by the nominee were those of defrauded customers assigned to the nominee under a Court-approved Plan, and not those of the Exchange. Thus no one of these actions or all of them together could possibly constitute the kind of appearance seeking affirmative relief sufficient to give jurisdiction over the Exchange, which was the basis for *Alexander* v. *Hillman*, 296 U.S. 222, and the other decisions relied on by the petitioner (pp. 7-9).

The issue actually posed by the petition is, however, the far narrower, primarily procedural question of whether the Court of Appeals properly dismissed his appeal from the District Court as premature.

Respondent submits that this decision was correct, that it does not conflict with the decision of any other Court of Appeals, and that, in any event, it does not involve facts or principles of law of any general importance to federal litigants other than the present petitioner. Thus it does not meet in any way the standards set forth in Rule 19(1)(b) of this Court as the necessary bases for granting a writ of certiorari.

I.

The Court of Appeals Correctly Dismissed Petitioner's Appeal as Premature.

A. The Appeal was Premature because the Memorandum of Decision Filed by the District Court did Not Constitute a Final Judgment or Order.

As stated above, no formal separate judgment or order was ever entered in the District Court, and the petitioner's appeal below was predicated on the theory that the memorandum of decision filed by the District Judge constituted a judgment dismissing his petition.

Normally a District Court decision must be final before it can be appealed. 28 U.S.C. 1291. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 29-30. Thus no appeal can be taken from a District Judge's opinion as such. *In re Chelsea Hotel Corp.*, 241 F. 2d 846, 848 (3d Cir., 1957). *United States* v. *Collins*, 300 F. 2d 821, 822 (1st Cir., 1962).

Accordingly, the present petitioner had no basis for an appeal unless the memorandum of decision falls into the limited categories of cases discussed in *United States* v.

F. & M. Schaefer Brewing Co., 356 U.S. 227. Therein this Court considered an appeal based on a statement in an opinion that (p. 229) "the plaintiff's motion [for summary judgment] is granted" and stated (at p. 232) that "an opinion may embody a *final decision*, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." (Emphasis in original.)

The instant memorandum of decision clearly does not meet this test. It does not contain any such language as "the petition is dismissed" or "the petition will be dismissed." Rather, it states only that "[t]he motion of the receiver to dismiss the petition of Legate is allowed *with respect to* the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange" (App. A, p. 17; R.A. 72) (emphasis supplied).

Moreover, this conclusion as to the trial judge's intention is reinforced by an earlier paragraph in the memorandum wherein he made it clear that he was not ruling on all the matters raised by the Legate petition. In describing the questions before him he stated (App. A, pp. 13-14; R.A. 69):

> "Petitioner seeks to rescind his partnership contract on the ground of fraud, to establish his standing as a general creditor for the amount of his partnership contribution, to establish a claimed right to priority over the Exchange as a creditor in the distribution of the assets of the firm, and to recover directly from the Exchange the amount of his partnership contribution less any amount which he may recover from the assets of the firm. The receiver moves to dismiss the petition insofar as it seeks the establishment of a priority over other creditors or direct recovery against the Exchange."

Thus, as stated by the Court of Appeals (App. B, p. 19), "it is evident that the action taken by the [District] court did not dispose of *every* issue raised by the petition to say nothing of the issues raised in the receivership proceeding as a whole" (emphasis in original).

B. The Appeal was Premature because the Action Taken by the District Court was at Most Interlocutory and the District Judge did Not Certify his Decision to the Court of Appeals under Rule 54(b) or 28 U.S.C. 1292(b).

The District Court proceedings, as is evident from the docket entries printed (R.A. 3-10) and the receiver's plan for partial liquidation (R.A. 11-37), were an equity receivership involving many issues and many parties. However, no one other than the present petitioner has made any attempt to take the proceedings or any part thereof to the Court of Appeals. Moreover, the petitioner's own "proof of claim was referred to a master who has not yet filed his report" (App. B, p. 18), and thus the petitioner himself is still an active litigant at the District Court level.

Accordingly, these proceedings fall squarely within the class covered in F. R. Civ. P. Rule 54(b), namely those wherein "more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved." See also, in this connection, 6 Moore's Federal Practice (2d ed.), where it was said concerning Rule 54(b) (at p. 259):

> ". . . the amended Rule will be applicable to many, probably most, receivership proceedings for these will usually involve multiple claims for relief; . . ."

To return to the text of Rule 54(b), it provides that in multi-claim or multi-party litigation,

> ". . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Yet, in the present instance, the District Judge filed neither "an express determination that there is no just reason for delay" nor "an express direction for the entry of judgment." Nor did the present petitioner ask that he take any such action.

That no partial appeal of a multi-claim, multi-party action is possible in the absence of such a determination and such a direction is well established both by the explicit language of Rule 54(b) and by numerous decisions dismissing such appeals. *Lehrer* v. *McCloskey Homes Inc.*, 242 F. 2d 190 (3d Cir., 1957). *Gallon* v. *Lloyd-Thomas Co.*, 261 F. 2d 28 (8th Cir., 1958). *Sierra* v. *Merchants Mutual Casualty Co.*, 262 F. 2d 287 (1st Cir., 1958). *Southern Parkway Corp.* v. *Lakewood Park Corp.*, 273 F. 2d 107 (D.C. Cir., 1959). *G.K.W., Inc.*, v. *Philco Corp.*, 276 F. 2d 928 (2d Cir., 1959).

The other possible route for an early appeal by the present petitioner was 28 U.S.C. 1292(b), which authorizes interlocutory appeals when the District Judge states in writ-

ing that his order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." However, no such certificate was sought or issued in the District Court.

Thus, as stated by the Court of Appeals (App. B, p. 20):

> ". . . The [district] court's action at the most was *purely interlocutory* and no attempt has been made to invoke the procedures for appealing such action, if indeed such procedures are available." (Emphasis in original.)

II.

There is No Conflict of Decision.

Petitioner attempts (pp. 5, 11-12) to establish a conflict of decision between the dismissal of his appeal below and the opinion of the Court of Appeals for the Ninth Circuit in *Marshall* v. *Sawyer*, 301 F. 2d 639 (9th Cir., 1962).

The fallacy of this contention is amply demonstrated by an examination of the facts of the two cases. *Marshall* v. *Sawyer* was an action under the Civil Rights Act involving only one plaintiff. The District Court dismissed the complaint (although not the action) "on the ground that the federal court should abstain and remit plaintiff to his state court remedies" (p. 641). The Court of Appeals concluded that this order was a "barrier to further district court proceedings" and that "plaintiff's appeal evidences a determination to stand on his complaint and accept the order as a dismissal of the action" (p. 643). It was therefore held that the order dismissing the complaint was appealable.

In contrast, the proceeding out of which the present petition arises is an equity receivership concerned with many claimants, of whom only the petitioner has yet made any attempt to appeal. Further, various aspects of the case are still being actually litigated in the District Court, including a master's hearing on petitioner's own proof of claim. Moreover, there is here no order dismissing Mr. Legate's entire petition. Rather, there is only a memorandum of decision allowing a motion to dismiss some aspects of that petition.

The instant situation is therefore in no way comparable to *Marshall* v. *Sawyer*, where the order complained of had effectively terminated all proceedings by all parties at the District Court level.

The petitioner also cites (pp. 6-7) *Foman* v. *Davis*, 83 S. Ct. 227, apparently on the theory that it is inconsistent with the dismissal of his appeal in this case.

That decision, however, was concerned with whether a Court of Appeals should have treated an appeal from orders denying motions to vacate judgment and to amend the complaint "as an effective, although inept, attempt to appeal from the judgment sought to be vacated" (p. 229). It thus involved the mechanics of claiming an appeal rather than the present problem of what constitutes a judgment or order from which an appeal can even be taken.

In addition, it differed from the instant proceeding in many important factual aspects: there was only one plaintiff or other claimant; the District Judge had denied a motion to amend; all trial Court proceedings had ended; and the dismissal of the appeal came only on the Court of Appeals' own motion after the parties had briefed and argued the merits (see p. 229).

III.

The Present Petition does Not Involve Facts or Principles of Law of General Importance to Federal Litigants.

Petitioner asserts (p. 6) that the propriety of the dismissal of his appeal "is a subject of vital importance to litigants in the federal courts." He does not, however, attempt any more detailed explanation of why this is so.

Nor is his contention that his situation is one of general application and importance borne out by the record. In the first place, the basic proceeding involved is an equity receivership, which is in itself a somewhat unusual and quite specialized type of case.

Second, Mr. Legate's status in the receivership proceeding was that of a claimant and his major present complaint appears to be that the District Court refused to allow him to use that proceeding as a vehicle for what amounts to a direct action against a non-resident entity which was never served with process and which was never a party to the proceedings. Surely, such a situation is highly unusual and of little or no value as a precedent or analogy in other litigation.

Third, the precise legal issue involved here is whether or not the language of the concluding paragraph of the District Judge's memorandum of decision constituted an appealable judgment or order. This is an area of the law in which this Court has recently laid down general guide lines in *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227. It is now clear that the question of whether an opinion embodies a final decision for purposes of appeal "depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion" (p. 232). Specific applications of this test to particular cases are the business of the lower Courts and no general benefit would result

from an opinion by this Court as to what a particular District Judge meant when he used certain specified language in a probably unique fact situation. Moreover, the Court of Appeals properly decided that the instant District Judge did not clearly intend his memorandum to be a final decision.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 18, 1963.